UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

NICO ASPHALT PAVING, INC.
AND ITS SUCCESSOR IN INTEREST
AND ALTER EGO, CITY WIDE PAVING, INC.

Case 29-CD-186692

Respondents

and

UNITED PLANT AND PRODUCTION
WORKERS, CC LOCAL UNION 175, IAM

Charging Party

and

HIGHWAY, ROAD AND STREET
CONSTRUCTION LABORERS LOCAL 1010,
LIUNA, AFL-CIO

Party in Interest

MEMORANDUM OF LAW ON BEHALF OF INTERESTED PARTY

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PRELIMINARY STATEMENT

This is an unfair labor practice proceeding brought pursuant to the National Labor Relations Act ("Act"). On October 20, 2016, Local Lodge CC175, International Association of Machinists & Aerospace Workers, AFL-CIO (hereinafter "Local 175") filed a charge under §§8(a)(2), (5) and 8(d) of the Act against Nico Asphalt Paving Inc. ("Nico") and Citywide Paving Inc. ("Citywide") (collectively "Respondents"). The charge alleges that Nico repudiated its collective bargaining agreement following its closure and Citywide, an alleged alter ego or successor of Nico, failed to bargain with Local 175, is alleged to have unlawfully entered into a collective agreement with the Highway, Road and Street Construction Laborers Local 1010, Laborers International Union of North America ("LIUNA"), AFL-CIO ("Interested Party" or "Local 1010"). The charge initially covered only "Non Con Edison work for Verizon and Welsbach Electric Corp" pursuant to a subcontract between Nico and Citywide. On September 29, 2017, Region 29 of the National Labor Relations Board (the "Board") issued a Complaint and Notice of Hearing based on Local 175's charge. The hearing was held at Region 29, in Brooklyn, New York, from December 11 through December 14, 2017 before Administrative Law Judge, Jeffery P. Gardner.

Based on the facts established at trial, the Complaint must be dismissed as untimely under §10(b) of the Act. The allegedly unlawful conduct complained of occurred no later than February 15, 2016 at which time Charging Party Local 175 had knowledge of Nico's actions. The charge was filed on October 20, 2016, well after the §10(b) period. The Complaint must therefore be dismissed because it is untimely and Your Honor should not reach the merits of the charges. The

Complaint also fails because the General Counsel has not established that for the work performed by Nico, Citywide is an alter ego or successor.

II
STATEMENT OF FACTS

A. The Parties

Nico was a construction company that performed sidewalk and street restoration work exclusively for utility companies in the five boroughs of New York City. Beginning in 2005, Nico has had a collective bargaining agreement with Local 175. (T35:23-36:3).[1]

Citywide was incorporated on December 15, 2015 (See GC. Ex. 19, Cert. of Incorp.). Danamarie Pietranico became the owner and president of Citywide in 2015. (T369:11-15).

In 2016, Interested Party, Local 1010, entered into a collective bargaining agreement with Citywide for the performance of site and grounds improvement, utility, paving, highway, and road and street construction work in the five boroughs of New York City. (See GC. Ex. 13, Local 1010 & Citywide CBA).

B. Events Giving Rise to the Dispute

Nico's largest client was Consolidated Edison ("Con Ed") for which it provided paving and asphalt services. (T102:9-13; T291:8-12). In 2014, Con Ed revised its contract terms to require contractors from whom it purchased utility asphalt patch-paving work to have collective bargaining agreements with unions affiliated with the Building & Construction Trades Council of Greater New York ("BCTC"), to ensure that an orderly process existed to resolve disputes. Local 175 brought an action against Con Ed based on its BCTC affiliation requirement. (See Respondents

[1] Citations are to page and line numbers of the Official Transcript.

Ex. 5). The Honorable Kimba M. Wood dismissed Local 175's Complaint, enforcing the validity of Con Ed's BCTC affiliation requirement. (See Respondents Ex. 6).

"In August of 2015, Con Ed indicated that they were not willing to give Nico Asphalt the work, because the Local 175 unit … was not able to join with the [BCTC]." (T224:13-225:4). Thereafter, Nico lost its contract with Con Ed. As the Con Ed work accounted for such a large percentage of Nico's total work, without it, Nico testified it could not remain in business. (T225:7-13). Following the loss of its Con Ed contract, President Michael Pietranico, Sr. was forced to shut down Nico's operations. *Id.*

During the second week of February 2016, Michael Pietranico, Sr. and Nico's Vice President John Denegall had telephone conversations with Local 175's Business Manager Roland Bedwell during which they told Bedwell that Nico lost its Con Ed contract. They advised Bedwell that, as a result, Nico was ceasing operations. At the same time there was activity in the yard because Citywide was initiating its operations. (T522:20-523:5; T533:16-534:4).

In February 2016, Michael Pietranico, Sr. met with all of Local 175's Nico employees and Mr. Bedwell at Nico's yard where it was explained that Nico could not stay in business without the Con Ed contract and was shutting down operations. (T285:19-286:20). The Monday following the meeting (and for several days thereafter), between 50-60 Local 175 members put up a picket line across the street from Nico's yard. (T288:3-23; T419:4-8). The Local 175 members became hostile and eventually the police were called and escorted the Local 175 members away from the area around Nico's yard. (T299:10-300:13). At this time, Local 175 and/or its members were aware of Citywide's operations because Local 175 had filed unfair labor practice charges alleging that Nico repudiated its contract with Local 175 by forming Citywide and that Citywide had entered into a collective bargaining agreement with Local 1010. (See GC. Ex. 1(o), 1(p)).

III

ARGUMENT

A. The Charge in this Action was Untimely Filed and the Case must be Dismissed.

The act complained of by Local 175 occurred in February 2016. The charge was filed in October 2016. Accordingly, this action is untimely. Section 10(b) of the Act "extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge." *NLRB v. Fant Milling Co.,* 360 U.S. 301, 309 n.9 (1959). The limitations period begins to run when the charging party obtains actual or constructive notice that the unfair labor practice has occurred. *American Thoro-Clean, Ltd.,* 283 NLRB 1107, 1118 (1987).

In determining whether a party was put on constructive notice, "the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence." *Cab Assocs.*, 340 NLRB 1391, 1392 (2003); *see also John Morrell & Co.*, 304 NLRB 896, 899 (1991) (section 10(b) period begins to run when "aggrieved party knows or should know that his statutory rights have been violated"); *Castle Hill Health Care Ctr. and Seiu 1199 New Jersey Health Care Union.*, 355 NLRB 1156, 1191 (2010) ("While it can be argued that there was no clear and unequivocal evidence of wrongdoing … the Union was put on notice of facts that reasonably would have engendered suspicion that an unfair labor practice had occurred…").

Former Nico Vice President John Denegall testified that he had a conversation with Local 175 Business Manager Roland Bedwell during the second week of February 2016 where he told Bedwell that Nico was forced to shut down and all of its work was being moved to Citywide so that Citywide could enter into an agreement with a BCTC-approved union in order to perform Con Ed work. (T522:20-523:5; T533:16-534:4).

Local 175's knowledge of the alleged unlawful acts no later than mid-February 2016 is further supported by the fact that shortly after both Bedwell's conversation with Denegall and

Michael Pietranico, Sr.'s meeting with Bedwell and the Local 175 members regarding Nico's closure, between 50-60 Local 175 members set up a picket line outside Nico's yard that lasted several days until it was ended by the police. (T288:3-23; T299:10-300:13; T419:4-8).

Local 175 member and former Nico employee Costantino Seminatore was present at the picket line outside Nico's yard. He testified that the Local 175 members were "getting a little antsy" and "would just start arguing" because "[t]hey lost their job[s]." (T299:20-300:4). Seminatore's testimony makes it abundantly clear that Charging Party Local 175 had knowledge of the facts giving rise to the underlying unfair labor practice charge in mid-February 2016 because, as established, during that time dozens of Local 175 members picketed outside Nico's yard to protest the very acts that gave rise to Local 175's instant charge against Respondents.

The Board has found clear and unequivocal notice when the repudiating party explicitly informs the other party that it is repudiating the contract. *See A & L Underground*, 302 NLRB 467, 469 (1991) (finding an employer clearly and unequivocally repudiated the contract when it "notified the Union by letter that it was repudiating any agreements with the Union"). It has also found clear and unequivocal repudiation when a party wholly fails to comply with a contract. *See St. Barnabas*, 343 NLRB 1125, 1129 (2004) ("[W]hen an employer consistently fails to recognize the union or to abide by the terms of a collective-bargaining agreement, the union is put on notice that the employer has repudiated the agreement."); *Natico, Inc.*, 302 NLRB 668, 671 (1991) (union had notice of employer's total repudiation of pension fund contributions contract when employer stopped making payments altogether).

"In *Postal Service Marina Center*, 271 NLRB 397 (1984), the Board held that henceforth it would focus on the date of unequivocal notice of an allegedly unlawful act, rather than on the date the act's consequences became effective." *Bryant & Stratton Bus. Inst.*, 321 NLRB 1007,

1024 (1996). The "clear and unequivocal" standard does not equate to actual notice, however. Under the "clear and unequivocal" standard, constructive notice is sufficient. *See SEIU, Local 3036,* 280 NLRB 995 (1986) ("clear and unequivocal standard only requires constructive notice").

Local 175 did not file the underlying charge against Respondents until October 20, 2016, well after the expiration of the six-month 10(b) statutory period. Where Section 10(b) is concerned, the Board consistently requires adherence to the limitations period. *See Chambersburg County Mkt.*, 293 NLRB 654 (1989) ("Strict adherence to the 10(b) limitation is prescribed by authoritative precedent and by legislative history."); *see also Dun & Bradstreet Software Services,* 317 NLRB 84 (1995) (Board dismissed complaint as time-barred where timely filed charge was untimely served 1-day beyond limitations period), *affirmed sub nom. Kelley v. NLRB,* 79 F.3d 1238 (1996).

Local 175's failure to timely file a charge against Respondents within the 10(b) period resulted in Local 175's counsel admitting during the hearing that there exists a "facial pending argument" for a statute of limitations bar to the action. (T550:23-551:6).

i. Withdrawn charges against Respondents do not toll the 10(b) statutory period.

Forced to acknowledge the existence of a "facial pending argument" for dismissal based on 10(b) statute of limitations, counsel for the Board and Local 175 attempted to obfuscate the issue by introducing timely filed but withdrawn charges Local 175 brought against Respondents. Counsel for Local 175 argued that the charges are "so closely related in time and in terms of the same facts … that [the Board] still ha[s] jurisdiction." (T550:23-551:6).

It is well settled however that the Board "treat[s] withdrawn and dismissed charges alike and [does] not allow the reinstatement of either beyond the 6-month limitations proviso absent fraudulent concealment of evidence by a respondent." *Northwest Towboat Assn.*, 275 NLRB 143, 144 (1985) (citing *Ducane Heating Corp.*, 273 NLRB 1389, 1391 (1985) (internal quotations

omitted). The Board "makes no distinction between a withdrawn charge and a dismissed charge. In their view, both cease to exist." *Duff-Norton Co.*, 275 NLRB 646, 651 (1985) (citing *Winer Motors*, 265 NLRB 1457 (1982)). Accordingly, the fact that Charging Party Local 175 filed and then withdrew a charge against Nico and Citywide alleging alter-ego status within the six-month 10(b) period would not toll or otherwise preserve the statute of limitations for the current charge which was brought after the expiration of the 10(b) period.

It is irrelevant that the current untimely charge and the withdrawn charge are "closely related." The "closely related" doctrine requires the existence of a viable and timely charge to attach the related, untimely charge. *See Redd-i, Inc.*, 290 NLRB 1115-1116 (1988). All of the prior charges against Respondents were withdrawn and therefore "cease to exist." *Duff-Norton Co.*, 275 NLRB at 651 (1985) (citing *Winer Motors*, 265 NLRB at 1457 (1982)). "Once a charging party voluntarily decides for whatever reasons to withdraw a charge, it ceases to exist. It is no charge at all. Moreover, as Section 10(b) establishes a 6-month statute of limitations, absent the existence of a properly served charge on file, a party is assured that on any given day his liability under the Act is extinguished for any activities occurring more than 6 months before." *Northwest Towboat Assn.*, 275 NLRB 143, 147 (1985) (internal citations omitted). Accordingly, there is no "closely related" charge for the instant untimely charge to attach to and it must be dismissed.

ii. Charging Party failed to demonstrate any fraudulent concealment on the part of Respondents and the Complaint must therefore be dismissed as time-barred.

Under the Board's policies, a dismissed unfair labor practice charge may not be reinstated outside the Section 10(b) statute of limitations period unless the dismissal of the charge was caused by a charged party's fraudulent concealment of material evidence. See *Northwest Towboat Assn.*, 275 NLRB 143 (1985) ("the Board determined that it would no longer permit a *withdrawn* charge

to be reinstated more than 6 months after the alleged unlawful conduct.") (citing *Winer Motors*, 265 NLRB 1457 (1982)).

"The Board has articulated a three-pronged test ... in describing the equitable fraudulent concealment doctrine. Under that test, fraudulent concealment tolls the 10(b) statute of limitations when, (1) there has been deliberate concealment of, (2) material facts relating to the alleged wrongdoing, and (3) the wronged party does not know of these facts and could not have discovered them through reasonable diligence. The Board has stressed that the three critical elements all must be present to warrant the tolling of the 10(b) period." *In Re Avne Sys., Inc.*, 331 NLRB 1352, 1355 (2000) (internal citations).

At the outset, there is no contention that Respondents engaged in any fraudulent concealment in connection with the Complaint, the charge upon which the Complaint was brought or the timely filed but withdrawn charges. Further, it is the duty of the party asserting fraudulent concealment (in this case Local 175 and the General Counsel) to show that the charging party failed to discover the concealed facts despite its due diligence. *Al Bryant, Inc.,* 260 NLRB 128, 135 (1982), *aff'd,* 113 LRRM 3690 (3d Cir. 1983). No such fraudulent act has been alleged. Even assuming *arguendo* that Charging Party properly alleged Respondents engaged in fraudulent concealment in its underlying charge, Local 175 failed to establish any affirmative acts of concealment on the part of Respondents which prevented Local 175 from bringing the current charge within the statutorily required time period.

"[T]he Board has not treated every act of concealment as a form of fraudulent concealment that warrants tolling of the limitations period. The Board has found that exculpatory statements by a respondent which are false or misleading are not sufficient to toll 10(b) where the charging party independently was aware of certain facts suggesting possible unlawful conduct." *Brown & Sharpe*

Mfg. Co., 312 NLRB 444, 445 (1993). Mere failure to disclose facts or mere denial of alleged wrongdoing does not constitute a fraudulent concealment. *Winer Motors, Inc.,* 265 NLRB 1457 (1982); *Al Bryant, Inc.,* 260 NLRB 128, 135 (1982), *aff'd,* 113 LRRM 3690 (3d Cir. 1983).

iii. Respondents' 10(b) Affirmative Defense of Statute of Limitations is Timely.

Respondents raised the Section 10(b) defense during the hearing and requested their Answer be amended to include the affirmative defense of statute of limitations. (T545:17-21). Your Honor granted Respondents' request. *Id.* The Section 10(b) defense can be raised either in the pleadings or at the unfair labor practice hearing. *See NLRB v. Wizard Method, Inc.*, 897 F2d 1233, 1236 (2d Cir 1990) ("failure to raise the issue in the pleadings **or at the hearing**, under ordinary Board procedures, would constitute a waiver of the defense.") (emphasis added); *see also Fed. Mgt. Co., Inc.*, 264 NLRB 107 (1982); *McKesson Drug Co.,* 257 NLRB 468, 468 n.1 (1981); *Sheehy Enterprizes, Inc. v. NLRB*, 602 F3d 839, 844 (7th Cir 2010) (Section 10(b) affirmative defense can be "raised in an answer to the general counsel's complaint or at the hearing before the ALJ."). Compare *Pub. Serv. Co. of Colorado*, 312 NLRB 459, 461 (1993) (10(b) defense untimely where "Respondent did not raise this defense until after the hearing had closed"). Respondents' 10(b) affirmative defense is therefore timely.

B. Nico and Citywide are not Alter Egos, nor is Nico the Predecessor of Citywide.

In making an alter ego or successor determination, the Board will look to factors such as whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervisors and ownership. *Hageman Underground Construction,* 253 NLRB 60 (1980); *Crawford Door Sales Co.,* 226 NLRB 1144 (1976). Nico is not an alter ego or predecessor to Citywide because Citywide is not a "continu[ation] [of Nico] in substantially unchanged form." *Am Prop. Holding Corp.*, 365 NLRB No 162 (2017).

At the time of the alleged unfair labor practice, Nico could not perform work for Con Ed. Not only does Citywide perform work for Con Ed, this work constitutes a vast majority of Citywide's overall work. It does not follow that Citywide is a continuation of Nico if a majority of the work performed by Citywide could not have been performed by Nico at the time of the alleged unfair labor practice. *See Atlantic Technical Services Corp.*, 202 NLRB 169 (1973) (Board found that successorship had not been established because of the lack of continuity in the employing enterprise).

Further, Citywide does not have "the same body of customers" that Nico had at the time of the alleged unfair labor practice. *Fall Riv. Dyeing & Finishing Corp. v. NLRB*, 482 US 27, 43 (1987). See *Radiant Fashions, Inc.*, 202 NLRB 938, 940 (1973) (No successorship finding where "50-60 percent of Respondent's business is … a customer with whom [previous employer] was not doing business at the time of the sale"). As stated, Citywide's biggest client is Con Ed and Nico could not perform work for Con Ed at the time of the alleged unfair labor practice. *See In Re Deck Bros., Inc.*, 2003 WL 22827739 (2003) ("[A]lter ego status is to be determined based on the developments which took place at the time the alter ego was formed, not on what may have happened at a later date.") (citing *Redway Carriers*, 301 NLRB 1113, 1115 (1999)) (internal quotations omitted)). "[T]he absence of any significant carryover in customers … indicate[s] an extinguishment of the continuity of [a previous employer's] business enterprise." *Radiant Fashions, Inc.*, 202 NLRB 938, 941 (1973); see also *Pinter Bros.*, 263 NLRB 723, 738 (1982) (in the context of other factors, 37% customers in common did not warrant alter ego finding).

Importantly, Nico's loss of its Con Ed contract was not precipitated as a means of enabling Nico to transfer operations to Citywide. It was Con Ed that ended its contract with Nico. Citywide contracted with Con Ed because Nico could not. (T221:11-522:15). It was only after Nico was

forced to close, that Citywide took over Nico's non-Con Ed contract work. *Id.* Michael Pietranico, Sr. attempted in earnest to keep Nico viable. (T225:7-13). In fact, both Michael Pietranico, Sr. and John Denegall testified that they had several conversations with Local 175 Business Manager Roland Bedwell asking Local 175 to become a member of the BCTC so that Nico could continue to work with Local 175 on Con Ed projects. (T522:22-523:5). Michael Pietranico Sr.'s testimony as to the financial inability of Nico to continue without the Con Ed contract was corroborated by John Denegall. (*Id.*; T522:22-523:5). There is no contrary evidence as to these facts.

The Board has found no alter ego status between entities where there were legitimate economic and business considerations behind the challenged actions and where unlawful motivation was not a factor. *See Alabama Metal Products, Inc.,* 280 NLRB No. 123 at 1096 (1986) ("Nor is there any significant evidence that the establishment of [the alleged alter ego] was designed to thwart or evade the bargaining agreement with the Union. [Rather,] the decision ... was based on economic considerations"); *Gilroy Sheet Metal*, 280 NLRB 1075, 1075 (1986) ("the cessation of one company and formation of the other resulted from matters unrelated to the Union, including personal health, financial, and marital difficulties"). Con Ed terminated its contract with Nico, and as a result, its business was no longer viable. There was no unlawful motivation on the part of Nico when it was forced to close its doors. Indeed, John Denegall testified to a preference to continue to work with Local 175. (T526:13-527:1).

i. Close familial relationship between Michael Pietranico, Sr. and Danamarie Pietranico is insufficient to establish an Alter Ego or Successor finding.

The close familial relationship between Michael Pietranico, Sr. and his daughter, Danamarie Pietranico is insufficient to establish an alter ego relationship. *See Kenton Transfer Co.,* 298 NLRB 487, 495 (1990) (factor of ownership or financial control was not "sufficiently strong to support an assumption of alter ego status" despite extensive familial ownership of both

entities); *L & J Equipment Co.,* 274 NLRB 20, 28 (1985) (alter ego finding not warranted even though principals of one corporation alleged as an alter ego were the children of the owners of the other asserted corporate alter ego); *see also Adanac Coal Co.*, 293 NLRB 290, 290 (1989) ("a finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owner of two companies."). Instead, "the Board focuses on whether the owners of one company retained financial control over the operations of the other." *Adanac Coal Co.*, 293 NLRB at 290.

There is no common ownership between Nico and Citywide despite the existence of a familial relationship. Danamarie Pietranico was never an owner of Nico. (T224:13-24; T371:7-16). Similarly, Michael Pietranico Sr. is not the owner of Citywide. (T369:11-14; T382:21-25); *see also Adnac Coal Co.,* 293 NLRB at 290 (finding no substantially identical ownership where different individuals were ultimately in control of separate companies). There is no evidence that Michael Pietranico, Sr. exercised any actual degree of financial control over Citywide. (T258:14-18). There is also no evidence in the record that Michael Pietranico, Sr. provided Danamarie Pietranico with any capital to establish Citywide. (T259:4-16). Rather, the evidence established that: (1) Danamarie Pietranico alone capitalized Citywide with her own savings; (2) Citywide is wholly owned by Danamarie Pietranico; and (3) Citywide is not under the financial control of either Michael Pietranico, Sr. or Nico. (T404:15-22; T259:4-16).

In *L & J Equipment Co.*, 274 NLRB 20, 27-28 (1985), the Board affirmed the decision of the Administrative Law Judge who concluded that a new business enterprise, Willow Tree, was not an alter ego of L & J, where the owners of Willow Tree were the children of the owners of L & J and where the two companies were engaged in substantially similar businesses. The Judge noted that "Willow Tree benefited in its formative period from the use of L & J's office facilities

from family land connections; from L & J's co-indemnification agreement to support its land reclamation bond, from the extensive credit arrangements...; from the generously flexible lease/purchase relationship on heavy equipment and from other operating items furnished gratis; from association with L & J or its satellite companies when Willow Tree applied for its mining license, and in other ways. L & J also was the principal purchaser of Willow Tree's coal." *Id.*

"Despite finding that Willow Tree had basically the same business purpose as L & J, and that it used some of the same equipment through generous lease agreements, the Judge concluded that Willow Tree was maintained as an independent corporation with respect to its operations and control of its own labor relations." *Island Architectural Woodwork*, 364 NLRB No. 73 (2016) (citing *L & J Equipment Co.*, 274 NLRB 20, 27-28 (1985)).

Pursuant to well established Board law, the clear lack of common ownership, management, and unlawful purpose requires a finding that Nico is not the alter ego or predecessor to Citywide.

ii. A Determination of an Alter Ego or Successor Relationship will not restore the Status Quo Ante.

The Board's remedial authority "is *expressly limited* by the requirement that its orders effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (emphasis added). "[T]he remedial purposes of the Act will be satisfied when the Respondents restore the *status quo ante* – compensate [the discriminatee] to the same extent following the discrimination as [the discriminatee] enjoyed prior thereto." *Stagehands Referral Serv.*, 354 NLRB 83, 89 (2009).

After Con Ed ceased to be a Nico client, Nico was dying. No finding of the Board can change that. Con Ed's contract with Nico encompassed a vast majority of Nico's business. The General Counsel tacitly acknowledged this in its Complaint which demands "an order requiring the restoration of the work performed for Verizon Sourcing, LLC and Welshbach Electric Corp., as it existed prior to February 22, 2016." (See GC Ex. 1(c)).

Any order that would require the recession of Citywide's collective bargaining agreement with Local 1010 for Con Ed work goes well beyond restoration of the "status quo ante." The recession of the Local 1010 contract would be of no benefit to Local 175 and only result in harm to the individuals working for Citywide. In a long line of cases the Board has held that even where there is a failure to honor a contract and a party is directed to comply with it, there must be a showing of *actual* loss to employees, before contributions can be sought. *Colletti Color,* 204 NLRB 647 (1973); *see also Service Roofing Co.,* 200 NLRB 1015 (1972); *Hasset Maintenance Corp.,* 260 NLRB 1211 (1982); *Napne's Olive Knoll Farms,* 223 NLRB 260 (1976); *Crest Beverage,* 231 NLRB 116 (1977); *Turnbull Enterprises,* 259 NLRB 934 (1982). If Citywide's CBA with Local 1010 was rescinded, the Con Ed work would not revert to Local 175. There can be no actual loss to the Local 175 members for the Con Ed work because it was not theirs to lose. A recession would result in all loss and no gain. The effect of such an order would therefore be strictly punitive.

It is well-established that the Board has no authority to punish, and its remedial orders may not be "punitive" in nature. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The Supreme Court has held that "the terms of a remedial order [must be] "sufficiently tailored" to the unfair labor practice it is intended to redress." *Sure-Tan, Inc. v. NLRB*, 467 US 883, 907 (1984). The Board's decisions in tailoring remedies must rise above arbitrariness and must be supported by substantial evidence and "must be sufficiently tailored to expunge only the *actual,* and not merely *speculative,* consequences of the unfair labor practices." *Id.* at 900. (emphasis added).

Accordingly, any order for Citywide to rescind its collective bargaining agreement with Interested Party, Local 1010 would go beyond restoration of the "status quo ante" and run counter to the governing principals and polices of the Act.

IV
CONCLUSION

Based on the foregoing, the Complaint must be dismissed as untimely under §10(b) of the Act. Charging Party Local 175 had knowledge of the alleged unlawful conduct no later than February 15, 2016. The charge was filed on October 20, 2016, well after the expiration of the §10(b) period. The Complaint also fails because the General Counsel has not established that, for the work performed by Nico at the time of the alleged unfair labor practice, it is the alter ego or predecessor of Citywide.

Dated: New York, NY
February 2, 2018

Respectfully submitted,

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